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No. 87-1176

In The

Supreme Court of the United States

October Term, 1987

DON'S PORTA SIGNS, INC., WEST COAST SIGN CO., LTD., SIGNS BY DESIGN OF FLORIDA, INC., NORWOOD LEASING, INC., DON LEWIS, INC., d/b/a INTERNATIONAL JEWELRY IMPORTS and R. W. WHITTLE, INC., d/b/a PIK-A-FLIK,

Petitioners,

vs.

CITY OF CLEARWATER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. SIEMON
(Counsel of Record)
WILLIAM W. MERRILL III
SIEMON, LARSEN, MATTLIN & PURDY
1800 Second Street, Suite 903
Sarasota, Florida 34236
(813) 955-9050

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the court of appeals erred in applying the standard of review established in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), when it reversed the district court's invalidation of a commercial speech regulation prohibiting portable signs.

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RESPONDENT'S BRIEF IN OPPOSITION

—o—

Respondent, City of Clearwater, respectfully prays that the Court deny the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

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STATEMENT OF THE CASE

Petitioners statement of the case contains several critical misstatements of the record. Petitioners note that portable signs are used for commercial and non-commercial messages. But Petitioners fail to state that the City of Clearwater's sign regulations "contain exemptions for political and other non-commercial speech." (Appendix 50-a).

The record also shows that the Eleventh Circuit reversed the district court's invalidation of the sign regulations based upon an "independent examination of the whole record," (Appendix 56-a), not a *de novo* review, as is misrepresented by Petitioners.

Finally, Petitioners state that the Eleventh Circuit found that the district court had applied the proper legal test. They fail to point out that the Eleventh Circuit also found that the district had predicated its findings on a misunderstanding of the governing rules of law under that test. (Appendix 54-a through 58-a).

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SUMMARY OF ARGUMENT

The law is clear in this case: reviewing courts, are obligated to independently review 1) mixed findings of law and fact, and 2) "ultimate constitutional facts"—including "judgments lying close to opinion regarding the whole nature of our Government" in cases involving First Amendment rights. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 485, 500 (1984); *Bartimo*

v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894 (5th Cir. 1983), *cert. denied*, 475 U.S. 1119 (1986).

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REASONS FOR DENYING THE WRIT

Petitioners contend that the Eleventh Circuit erred by going beyond the "clearly erroneous" standard of review because, according to Petitioners, the *Bose* rule of independent review[1] does not apply in an appeal from a district court determination that a local regulation does not "directly advance" the government's aesthetic interest and is "more extensive than necessary" to accomplish that goal. This argument has been repeatedly rejected by this Court and the courts of appeals.

It is well-settled under *Bose* and its progeny that the "findings" reviewed by the Eleventh Circuit involve "constitutional facts," "special facts that have been deemed to have constitutional significance," or "judgments lying close to opinion regarding the whole nature of our Govern-

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[1]The Eleventh Circuit in the decision below expressed that it must make "an independent examination" of the record "to determine whether a commercial speech regulation [prohibiting portable signs] directly advances the government's [aesthetic] goals or is more extensive than necessary," *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053-1054, n. 9 (11th Cir. 1987). Petitioners nonetheless incorrectly state and argue that the Eleventh Circuit "applied a *de novo* review of the District Court's findings," Pet. at 4, *passim*. This Court explained in *Bose* that:

> The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing Court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for Plaintiff.

ment." *Bose*, 466 U.S. at 505. *See Dunagin v. City of Oxford*, 718 F.2d 738, 748-749, n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108, n. 9 (5th Cir. 1987), *cert. denied*, U.S. (Case No. 87-799. Jan. 11, 1988); *Tavoulareas v. Piro*, 759 F.2d 90, 108 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985).

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THE ELEVENTH CIRCUIT DID NOT ERR IN INDEPENDENTLY REVIEWING MIXED QUESTIONS OF LAW AND FACT

The law is clear: reviewing courts, such as the Eleventh Circuit, are obligated to independently review mixed findings of law and fact. This Court put it well in *Bose*:

> But Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a *so-called mixed finding of law and fact, or a finding of fact that is predicated on the misunderstanding of the governing rule of law.*

Bose, 466 U.S. at 501. (emphasis added).

In the case *sub judice*, the Eleventh Circuit recognized that the district court applied the proper four-part commercial speech test dictated by *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557 (1980). But, the circuit court found that the district court made findings under the third and forth prongs of the *Central Hudson* test predicated on a misunderstanding of the governing rules of law—rules of law that inherently involve

mixed questions of fact and law. *Don's Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1053-54 (11th Cir. 1987). *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 557 (1980); *Members of the City Council v. Taxpayers of Vincent*, 466 U.S. 789 (1984); *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1987); *Lindsay*, 821 F.2d 1103; *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985). The Eleventh Circuit did not err in applying independent review to the mixed questions of fact and law findings germane to the third and fourth prongs of the *Central Hudson* test. In fact, the court of appeals was obligated to make such a review.

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THE ELEVENTH CIRCUIT DID NOT ERR IN INDEPENDENTLY REVIEWING QUESTIONS OF "CONSTITUTIONAL FACT"

The *Bose* Court emphasized that the requirement of independent review of First Amendment constitutional issues is a rule of federal constitutional law.

> It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection *is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold* that bars the entry of any judgement that is not supported by clear and convincing proof of "actual malice."

Bose, 466 U.S. at 510-11 (emphasis added).

Most important, this Court, after delineating the appropriate standard of review, identified the types of "findings" that are subject to independent review:

> In each of these areas, the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the *judicial evaluation of special facts that have been deemed to have constitutional significance.* In such cases, the Court has regularly conducted an independent review of the record book to be sure that the speech in question actually falls within the unprotected category and *to define the perimeters of any unprotected category with acceptably narrow limits* in an effort to ensure that protected expression will not be inhibited.

Bose, 466 U.S. at 504-505 (emphasis added). This Court emphasized that:

> "The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. Finding so-called ultimate 'facts' more clearly implies the application of standards of law. . . . Though labeled 'finding of fact,' it may involve the very basis on which judgement of fallible evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. See, e.g., *Beyer v. Le Fevre*, 186 U.S. 114, 22 S.Ct. 765, 46 L. Ed. 1080 (1902). *Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.*" *Baumgartner v. United States*, 322 U.S. 665, 670-671, 64 S. Ct. 1240, 1243-1244, 88 L. Ed. 1525 (1944).

Bose, 466 U.S. at 500 (emphasis added). *See Dunagin v. City of Oxford*, 718 F.2d 738, 748-49, n. 8 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984) ("legislative facts" or "questions of constitutional magnitude"); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1108, n. 9 (5th Cir. 1987), *cert. denied*, —U.S.— (Case No. 87-799. Jan. 11, 1988) ("constitutional 'status'"); *Tavoulareas v. Piro*, 759 F.2d 90, 108 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985) ("ultimate constitutional fact").[2] *See, generally, Pullman-Standard v. Swint*, 456 U.S. 273, 286-87, n. 16 (1982).

This Court, "in marking out the limits of the standard," *Bose*, 466 U.S. at 503, put forth the rule that certain findings cross the threshold of "pure fact" and become constitutionally significant because they are "close to opinion regarding the whole nature of our Govern-

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[2]Examples of such facts which are subject to independent review under the well-settled precedent of this Court and the courts of appeal include whether a writing was "obscene," whether there was a "clear and present danger," whether there was "actual malice," or other factual conclusions about the speaker's intent, audience effect, and other elements of context that are not easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns." *Lindsay*, 821 F. 2d at 1108, n. 9; *See Bose*, 466 U.S. at 505-506; *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Rankin v. McPherson*, — U.S. —, 107 S. Ct. 2891 (1987); *Bartimo*, 771 F.2d 894; *Dunagin*, 718 F.2d at 748-49, n. 8.

Findings which may *not* be subject to independent review have been identified as "preliminary factual determinations," (*Tavoulareas*, 759 F. 2d at 108), "what was said" (*Lindsay*, 821 F 2d at 1108), "logic and common experience which are ordinarily entrusted to the finder of fact" (*Bose*, 466 U.S. at 501, n. 17) or any other facts which are not so intermingled with a conclusion of law as to a federal right to require analysis by independent review (*Fiske v. Kansas*, 274 U.S. 380, 385-87 (1927)).

ment," that is, "ultimate constitutional fact." *Bose*, 466 U.S. at 500, n. 16.[3] In such cases, this Court emphasized that reviewing courts must not only provide protection to parties asserting First Amendment rights, but also define the perimeters of those rights to ensure that they are not abused. *Id. See Bartimo*, 771 F.2d at 897.

The courts of appeal have followed this Court's lead and have recognized the importance of independently reviewing "ultimate constitutional facts". In *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), the court of appeals ruled that the trial court's findings are "clearly not" subject only to a clearly erroneous standard of review (*Dunagin*, 718 F.2d at 748, n. 8):

> There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another?

[3]Petitioners themselves state "[e]ven where the underlying judgment is against the party asserting First Amendment rights, independent review extends only to ultimate conclusions." Pet. at 11-12. However, they fail to understand the types of "findings" which comprise "ultimate conclusions," or better, "ultimate constitutional facts." *See Bose*, 466 U.S. at 505-506. *See* n. 1, *supra*, at 3. Whether a commercial speech regulation "directly advances" a government's interest and whether it is "no more extensive than necessary" to accomplish its goals is the type of "ultimate constitutional fact" that is within the purview of independent review. *Id.*

Dunagin, 718 F.2d at 749. Most instructive, the *Dunagin* court reasoned:

> In the first place, the issue of whether there is a correlation between advertising and consumption is a *legislative and not an adjudicative fact question.* It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to *remain subject to opinion and reasoning.* See Fed.R.Evid. 201 advisory committee note. That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. The specific issue here was undoubtedly considered by the Mississippi Legislature when local option and the curtailment of liquor consumption were being studied. Now the issue has moved to the judicial stage. *If the legislative decision is not binding at this stage, at least it carries great weight. Certainly it cannot be thrust aside by two experts and a judicial trier of fact.* The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court. (cites omitted) *Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjudication wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests.* The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. "The protection available for particular commercial expression turns on the nature both of the expression and of the government interests served by its regulation." *Central Hudson Gas, supra*, 447 U.S. at 563,

> 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which *Metromedia*, . . . and other cases temper the *Central Hudson Gas* test is a legal question.

Dunagin, 718 F.2d at 748 (emphasis added). *See Central Hudson*, 447 U.S. 557, 563 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

Most notably, this Court denied certiorari review in the most recent case which presented to this Court the same question presented by Petitioners for review in the instant case. *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, —U.S.— (Case No. 87-799. Jan. 11, 1988), is a case astonishingly similar to the facts and law presented in the instant case. In that case, businesses engaged in supplying, leasing, renting and selling portable signs brought an action challenging, under First and Fourteenth Amendments, the constitutionality of the city's commercial speech regulation prohibiting portable signs. The district court granted the portable sign businesses' motion for preliminary injunction against enforcement of the regulation, and the City appealed. The court of appeals held that the city's portable sign ban directly advanced the city's aesthetic interests and that it was not substantially broader than necessary to protect that interest.

In arriving at its holding, the appellate court relied on the *Bose* rule and independently reviewed the district court's findings germane to First Amendment issues of a constitutional magnitude.

> Thus, the critical inquiries are, as the District Court stated, whether the ordinance does further the City's interests and whether the restriction on speech is greater than is essential to the furtherance of those interests.

Lindsay, 821 F.2d at 1109. The court of appeals recognized that the "critical inquiries" were, in essence, constitutional questions involving separation of powers between the legislative and judicial branches of government.

> The limits on such a determination seem boundless. In a related vein, when a trial court makes such a finding, the potential for the court to substitute its own judgment about aesthetics for that of the body charged with making aesthetic determinations is great. Left open is the possibility that the trial court will decide that nothing short of full achievement—as opposed to "furtherance"—of a governmental purpose is sufficient to justify a particular restriction on speech. Indeed, in the instant case, notwithstanding, protestations by the court to the contrary, the court's general description of the problem with the ordinance —"its failure to accomplish its aesthetic purpose" —suggests that the district court took such an approach to the question raised under *Vincent* of whether the regulation "furthers an important or substantial governmental interest." *Vincent*, 466 U.S. at 805 (cites omitted). It seems that the district court may have been holding the City to a standard requiring it to cure all visual blight, or none at all.

Lindsay, 821 F.2d at 1109. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 931 (1986).

Under the reasoning employed in *Bose*, *Rankin v. McPherson*, — U.S. —, 107 S.Ct. 2891, 2896 (1987), *reh. denied*, —U.S.— (1987), and *Dunagin*, 718 F.2d at 748-49, n. 8, the court of appeals found that the findings under the third and fourth prongs of the *Central Hudson* test are

ones for which independent review is appropriate. Thus, "the decision on whether a regulation of commercial speech directly advances the state's interest is an exercise of constitutional adjudication wherein appellate courts play a special role." *Dunagin*, 718 F.2d at 748, n. 8. The court of appeals was required to apply the legal tests that evolved in constitutional law, including *Metromedia*, 453 U.S. 490 (1981) (plurality); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Clarke v. Committee for Creative Non-Violence*, 468 U.S. 288 (1984); *Harnish v. Manatee County*, 783 F.2d 1535 (11th Cir. 1986); *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528 (11th Cir. 1985); and *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), in order to interpret the third and fourth prongs of the *Central Hudson* test as it applies to the facts in the case. Such application invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests. *Dunagin*, 718 F.2d at 748.

These cases, contrary to Petitioners' argument, are instructive and control the decision in the instant case. Without repeating all of the findings in the case *sub judice*, it is appropriate to say that it is on point with the facts in *Lindsay*, and that the findings were quite similar. The Eleventh Cicruit, in accordance with these established principles, independently reviewed the First Amendment issues of constitutional magnitude. The proper application of the controlling constitutional law on the substantive issues required the court of appeals to independently review these "judgments lying close to opinion regarding the whole nature of our Government," which this Court calls "ultimate constitutional facts."

PETITIONERS' ARGUMENT IS FALLACIOUS RESULTING FROM CONVERSION OF AFFIRMATIVE PROPOSITIONS IN BOSE AND ITS PROGENY

Respondent submits that Petitioners' glib argument is, in fact, a house of cards constructed of non sequiturs[4] and out-of-context quotes.

Whether or not a party asserting First Amendment rights won or lost at the trial court level is not determinative of whether or not fundamental constitutional principles are involved and whether the reviewing appellate court is empowered to conduct an independent review. *See Bose*, 466 U.S. 485 (1984); *Lindsay*, 821 F.2d 1103 (5th Cir. 1987), *cert. denied*, — U.S. — (Case No. 87-799. Jan. 11, 1988); *Dunagin*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984); *Bartimo*, 711 F.2d 894 (5th Cir. 1983), *cert. denied*, 475 U.S. 1119 (1986); *Tavoulareas v. Washington Post Co.*, 759 F.2d 90 (D.C. Cir. 1985), *vacated in part by*, 763 F.2d 1472 (D.C. Cir. 1985).[5]

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[4]Although never stated or implied by the Court in *Bose* or any of its other cases, Petitioners suggest that the decision by district courts (whether against or in favor of the party asserting First Amendment rights) will always determine the standard of review to be applied by reviewing courts in First Amendment cases. Such a position is ridiculous. *See Bose*, 466 U.S. at 510, n. 29; *Bartimo*, 771 F. 2d at 898, n. 3.

[5]Respondent submits that it is significant that Petitioners fail to contest, or even address, the substantive issues presented below in the district court and court of appeals. The merits below, which are not under consideration by the Court in this case, concerned the third and fourth prongs of the four-part commercial speech test established in *Central Hudson*, 447 U.S.

(Continued on following page)

It is evident from reading the entire opinion of the Court in *Bose*[6] that the rationale of *Bose* applies here. Petitioners simply ignore the Court's broad language in *Bose*, which makes no distinction whatever between cases where judgment was in favor of the alleged defamer and those where judgment was in favor of the alleged defendant. The Fifth Circuit in *Bartimo* observed that if the Court had intended to make such a distinction, it would have so limited its holding in *Bose*. *Id.*[7]

> [D]*efinition of First Amendment protection requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.*

Bartimo, 771 F.2d at 897, *cert. denied*, 475 U.S. 1119 (1986). (emphasis added).

Indeed, this Court did not limit its holding in *Bose* and, in fact, indicated just the opposite proposition as to Petitioners' argument. The Court underscored the signifi-

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557 (1980). Specifically at issue was whether a commercial speech regulation prohibiting portable signs directly advanced the government's aesthetic goals or was more extensive than necessary to accomplish those goals. *Don's Porta Signs, Inc.*, 829 F. 2d 1051, 1053-54, n. 9.

[6]Petitioners, by sleight of hand, attempt to string together bits and pieces of the *Bose* opinion in an attempt to camouflage the weakness of their petition as well as to invent grounds on which to base their petition.

[7]See n. 9, *infra*, at 15.

cance of the independent review standard and identified one of the rationales behind the rule:

> A similar concern with the need to "preserve the right of free speech *both* from suppression by tyrannous, well-meaning majorities *and from abuse by irresponsible, fanatical minorities,*" (cite omitted) was identified by Justice Brandeis . . .

Bose, 466 U.S. at 510, n. 29 (emphasis added). The rule of independent review, as the Court has concluded, is exercised not only to *protect* the party asserting First Amendment rights, but also to prevent *abuse* by that party.

Most instructive is the Fifth Circuit's well-reasoned decision in *Bartimo v. Horsemen's Benevolent and Protective Ass'n*, 771 F.2d 894 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986).[8] In *Bartimo*, the trial court found that

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[8]The Fifth Circuit has noted that:

> The Supreme Court has declared that while summary dispositions of appeals are decisions on the merits that bind lower federal courts, such decisions extend only to "the precise issues presented and necessarily decided by those actions. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

Respondent suggests that this Court's denial of certiorari review in *Dunagin*, *Lindsay*, and *Bartimo* provides binding precedent for federal courts of appeal and district courts to follow. Each of these cases presented the same question presented for review in the instant case to this Court. For example, in *Lindsay* this Court was presented with the following "question presented for review:"

> Whether the rule announced in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) requiring that courts of appeal examine the whole record of a proceeding to assure that First Amendment rights are not intruded upon was properly applied to overturn a district court's preliminary injunction protecting Petitioner's rights to free expression.

no actual malice existed and dismissed plaintiff's defamation claim. In so doing, of course, the trial court ruled *in favor* of the party asserting First Amendment rights. In reviewing the trial court's finding in favor of the party asserting First Amendment rights, the Fifth Circuit exercised the rule of independent review which was stated by this Court "in terms broad, clear and without exception." *Bartimo,* 771 F.2d at 897. The defendant's claimed that the *Bose* rule did not apply because "the district court's finding of no actual malice and its dismissal of the plaintiff's defamation claim present no threat to the First Amendment values," *Bartimo,* 771 F.2d at 897, but the Fifth Circuit flatly rejected that argument.

> First, it is not clear to us that the rationale of *Bose,* is inapplicable here, for *definition of First Amendment protection requires inclusion as well as exclusion and the former is no less a judicial function merely because it does not pose a direct threat to First Amendment values. Including speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.*

Bartimo, 771 F.2d at 897 (emphasis added).

Petitioners rely upon a Seventh Circuit Court of Appeals decision in *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority,* 767 F.2d 1225 (7th Cir. 1985). Petitioners argue that the Seventh Circuit opinion in *Planned Parenthood* stands for the proposition that where the trial court rules in favor of the party asserting First Amendment rights, the standard of review established in *Bose* should not apply.[9] *Planned Parenthood* recognized that *Bose* required independent review of "certain facts that have been deemed to have *constitutional significance.*" *Planned Parenthood,* 767 F.2d at 1229 (emphasis added). The Seventh Circuit emphasized that the rule reflects a special solicitude for claims that the protection afforded by the First Amendment have been unduly abridged.

In determining whether the *Bose* rule should apply to the factual questions on appeal in that case, the Seventh Circuit recognized that only three of the District Court's factual findings were being challenged: "(1) That CTA has previously accepted 'controversial public-issue advertising,' (2) that CTA has no policy against accepting such advertising, and (3) that CTA's expressed reasons for rejecting abortion-related advertising are unfounded and speculative." *Planned Parenthood,* 767 F.2d at 1228. None of the fact questions were mixed questions of fact and law, or "constitutional facts." Indeed, each of these "factual findings" of the district court which were challenged on appeal was the type of finding that truly involves "pure fact." None of the fact questions presented to the Seventh Circuit in that case involved "judgments lying close to opinion regarding the whole nature of our Government" and did not constitute an "ultimate constitutional fact."

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[9]Petitioners' argument to apply the independent review standard only if the trial court ruled against the party asserting First Amendment rights would introduce the possibility of a particular record being reviewed by two different standards as it made its way through the appellate process. *Bartimo,* 771 F. 2d at 898, n. 3. "We think judicial economy is best served by requiring the same standard of review at all levels, regardless of the outcome below." *Id.*

See Bose, 466 U.S. at 500, n. 16. Petitioner's reliance on *Planned Parenthood* through the artifice of out-of-context quotation should be ignored.

In *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984), the Fifth Circuit once again exercised independent review in a case where the party asserting First Amendment rights prevailed at the trial level. And once again, the same question was presented for review as the one presented by Petitioners in this case.[10] In that case, and its connected case, the court of appeals independently reviewed two trial court decisions that split[11] on the issue of whether Mississippi's intrastate liquor advertising ban unconstitutionally abridged plaintiffs' commercial speech rights. In *Dunagin*, the district court found *against* the party asserting First Amendment rights. In the companion case, the district court found *in favor* of the party asserting First Amendment rights. Finding itself in the unique position of having both sides of the argument before it on the same First Amendment questions of constitutional magnitude, the Fifth Circuit stated that the trial courts' findings are "clearly not" subject only to a clearly erroneous standard of review (*Dunagin*, 718 F.2d at 748, n.8):

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[10]See n. 8, *supra*, at 15.

[11]Two suits were filed attacking, principally on First Amendment grounds, a Mississippi commercial speech regulation prohibiting intrastate liquor advertising. The U.S. District Court for the Northern District of Mississippi *upheld* the regulation (*against* the party asserting First Amendment rights) in *Dunagin v. City of Oxford*, 489 F. Supp. 763 (N.D. Miss. 1980); the Southern District *invalidated* the regulation (*in favor* of the party asserting First Amendment rights) in *Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n*, 539 F. Supp. 817 (S.D. Miss. 1982).

> ***Furthermore, the decision on whether a regulation of commercial speech directly advances the state's interest, for example, is an exercise of constitutional adjucation wherein appellate courts play a special role. Applying the legal tests that have evolved in constitutional law invariably requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests.*** The Supreme Court has often warned that each First Amendment case must be analyzed separately, based on the particular method of communication involved, and the values and dangers implicated. "The protection available for particular commercial expression turns on the nature both of the expresison and of the government interests served by its regulation." *Central Hudson Gas, supra*, 447 U.S. at 563, 100 S.Ct. at 2350. The questions raised in such cases involve mixed questions of law and fact. In this case, for instance, the extent to which *Metromedia*, . . . and other cases temper the *Central Hudson Gas* test is a legal question.

Dunagin, 718 F.2d at 748 (emphasis added). *See Central Hudson* 447 U.S. 557, 563 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

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CONCLUSION

For the foregoing reasons, the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

CHARLES L. SIEMON
(Counsel of Record)
WILLIAM W. MERRILL III
SIEMON, LARSEN, MATTLIN & PURDY
1800 Second Street, Suite 903
Sarasota, Florida 34236
(813) 955-9050

Counsel for Respondent